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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

XUEDAN WANG, on behalf of herself and all others similarly situated,	:	
Plaintiff,	:	**12 CV 793 (HB)**
- against -	:	**MEMORANDUM ORDER**
THE HEARST CORPORATION,	:	
Defendant.	:	

Hon. HAROLD BAER, JR., District Judge:

Before the Court is Plaintiffs' motion to certify the Court's Opinion & Order of May 8, 2013 for immediate appeal pursuant to 28 U.S.C. § 1292(b). Therein I denied Plaintiffs' motion for partial summary judgment with respect to their "employee" status under the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL") and denied class certification based on U.S. Supreme Court precedent. *Wang v. Hearst Corp.*, No. 12 Civ. 793, 2013 WL 1903787 (S.D.N.Y. May 8, 2013). Defendant Hearst Corporation ("Hearst") does not oppose the motion. For the reasons set forth below, Plaintiffs' motion is GRANTED.

Background

Plaintiffs worked at Hearst's various magazines as unpaid interns. On behalf of themselves and those similarly situated, Plaintiffs claim that they were Hearst's "employees" under the FLSA and NYLL and that Hearst denied their minimum, overtime, and spread-of-hour wages by classifying them as unpaid interns. Originally, Plaintiffs proposed two classes: (1) an Intern Class comprised of unpaid and underpaid interns, and (2) a Deductions Class comprised of interns who received college credit amounted to an unlawful deduction from their wages.

I granted conditional certification of the Intern Class pursuant to Section 216(b) of the FLSA, 29 U.S.C. § 216(b), and denied Defendant's motion to strike the class and collective allegations under the FLSA and NYLL, *Wang v. Hearst Corp.*, No. 12 Civ. 793, 2012 WL 2864524 (S.D.N.Y. July 12, 2013), *recons. denied*, 2012 WL 3642410 (S.D.N.Y. Aug. 24, 2012). Defendants subsequently moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12 (c) with respect to Plaintiffs' claim under Section 193 of the NYLL, which prohibits employer's "deduction from the wages of an employee" except under statutorily delineated circumstances. N.Y. Lab. Law § 193. I granted that motion and rejected Plaintiffs' theory that the Hearst took "unlawful deductions" from some of the interns by requiring them to pursue academic credit from an accredited college or university. *Wang v. Hearst Corp.*, No. 12 Civ. 793, 2013 WL 105784 (S.D.N.Y. Jan. 9, 2013).

Discussion

Shortly before trial, Plaintiffs moved for partial summary judgment under Fed. R. Civ. P. 56(a) and class certification pursuant to Fed. R. Civ. P. 23(a) and b(3). Plaintiffs now move to certify the Court's Opinion & Order denying that motion pursuant to 28 U.S.C. § 1292(b). I denied Plaintiffs' summary judgment motion with respect to their "employee" status under the FLSA and NYLL because I found a genuine issue of material fact under the totality of circumstances test established in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), and the Department of Labor's six-factor test, U.S. Dep't of Labor, "Fact Sheet # 71: Internship Programs Under The Fair Labor Standards Act," available at http://www.dol.gov/whd/regs/compliance/whdfs71odf ("DOL Fact Sheet #71"). *Wang*, 2013 WL 1903787, at *5. I denied certification of a Rule 23 class for Plaintiffs' claims on the ground that the commonality and predominance prongs were not satisfied. The only evidence of Hearst's uniform policy was that Plaintiffs were unpaid interns whereas the nature of their tasks varied broadly amongst the twenty (20) magazines where they interned. *Id.* at *7 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)). These concerns were exacerbated by the inability to fix damages with a fact pattern such as this. *Id.* at *8 (citing *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013)).

Section 1292(b) provides that a district court may seek an order for an immediate appeal when it is of the opinion that there is a "[1] a controlling question of law [2] there is substantial ground for difference of opinion [3] and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." § 28 U.S.C. 1292(b).

Here, all of the three criteria are satisfied. First, controlling questions of law include whether the facts here support a finding that neither dominance nor commonality were satisfied so that a class might be certified. *See Wal-Mart Stores*, 131 S. Ct. at 2551 ("What matters to class certification . . . is . . . the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.") (citation omitted); *Myers v. Hertz Corp.*, 624 F.3d 537, 549 (2d Cir. 2010) ("In possible contrast to a uniform corporate policy detailing employees' job duties, the fact of common exemption does not establish whether all plaintiffs were actually entitled to overtime pay or whether they were covered by the applicable administrative regulations defining FLSA's exemptions."). In *Comcast Corp.*, the Court went on to find that the Circuit Court had erred in its predominance analysis by failing to consider whether "questions of individual damage calculations will inevitably overwhelm questions common to the class." 133 S.Ct. at 1433. Whether in such a case the totality of circumstances is or is not the appropriate legal standard is another controlling question of law. *See Walling*, 330 U.S. at 153. A decision on these questions will significantly affect the conduct of other lawsuits now pending in the district courts which have relied on other legal standards or the same legal standard, but have come out differently. *See, e.g.*, *Glatt v. Fox Searchlight Pictures*, No. 11 Civ. 6784 (WHP), 2013 WL 2495140 (S.D.N.Y. June 11, 2013).

Secondly, as the questions raised by Plaintiffs in this case and in *Glatt* are difficult and one of first impression, they clearly provide fodder for different opinions and have spawned them. Both *Wang* and *Glatt* applied the totality of circumstances test spelled out in *Walling* and the DOL Fact Sheet #71. *See Glatt*, 2013 WL 2495140, at *12; *Wang*, 2013 WL 1903787, at *4. Despite careful analysis provided in each opinion, the District Courts reached very different results. While the Second Circuit confronted a somewhat similar issue in *Velez v. Sanchez*, that case dealt with the status of domestic service workers and not that of unpaid interns, and thus different law was applicable and different policy considerations came into play. 693 F.3d 308 (2d Cir. 2012).

If the Second Circuit provides clarification or a different legal standard, it will guide a resolution of the outstanding issues pending in the Circuit. As the cases suggest, an appeal should be considered if it will advance the ultimate termination of the litigation. *See Transp. Workers Union, Local 100 v. N.Y.C. Transit Auth.*, 358 F. Supp. 2d 347, 350 (S.D.N.Y. 2005).

Conclusion

For the reasons stated, Plaintiffs' motion is GRANTED. The Court certifies its Opinion & Order dated May 8, 2013 for interlocutory appeal under § 28 U.S.C. 1292(b). The underlying case will be stayed during the pendency of this motion and if the appeal is granted the stay will continue to the date of the Circuit's decision.

SO ORDERED
June 21, 2013
New York, New York

Hon. Harold Baer, Jr.
U.S.D.J.